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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION
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SECURITY COUNCIL
Forty-eighth year

Letter dated 6 April 1993 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General

Upon instructions, I have the honour to forward herewith the text of a memorandum by the Government of Brazil on aspects related to the implementation of Security Council resolution 808 (1993), of 22 February 1993, regarding the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda items 91, 97 (c), 129 and 143, and of the Security Council.

(Signed) Ronaldo Mota SARDENBERG
Ambassador
Permanent Representative of Brazil
to the United Nations

ANNEX

Memorandum dated 31 March 1993 by the Government of Brazil on aspects related to the implementation of Security Council resolution 808 (1993)

1. Brazil has condemned in the strongest terms the serious war crimes and crimes against humanity committed in the ongoing conflict in the territory of the former Socialist Federal Republic of Yugoslavia. Those horrendous acts have shocked and outraged the Government of Brazil and Brazilian society. They call for strong action by the international community, including through the United Nations, to uphold the fundamental values of justice and the dignity of the human person. There can be no doubt that the perpetrators of such crimes must be held personally accountable for their acts and must be brought to justice.

2. To that end, the Government of Brazil favours the establishment of an international tribunal to prosecute and try persons found to be responsible for serious violations of international humanitarian law committed in the territory of the former Socialist Federal Republic of Yugoslavia since the outbreak of conflict in 1991. In that spirit, Brazil voted in favour of Security Council resolution 808 (1993) of 22 February 1993 and attaches great importance to the work now being carried out by the Secretary-General in preparing the report to be submitted to the Security Council in accordance with paragraph 2 of that resolution.

3. The discussions and studies carried out for some time by the International Law Commission concerning the possibility of an international criminal jurisdiction and the related subject of a draft code of crimes against the peace and security of mankind are indicative of the legal and practical difficulties involved in the structuring and the operation of any such international jurisdiction. Not only are those difficulties of a technical nature, but they also relate to the problem of ensuring the political support that is required for an international court to be a meaningful institution.

4. The creation of an international criminal tribunal ought to reflect a careful and comprehensive examination of the extremely complex issues involved in this initiative. To that end, a wide spectrum of consultations with legal experts from different countries and different legal systems should prove to be extremely useful. Prior studies undertaken on this and related subjects, as well as the records of intergovernmental discussions and deliberations, such as those undertaken in the Sixth Committee of the General Assembly, can also provide valuable elements for the success of the endeavours resulting from resolution 808 (1993).

5. The Government of Brazil has carefully considered the suggestions submitted by other Member States, notably those contained in the documents recently presented to the Security Council by France (S/25266), Italy (S/25300) and Sweden, on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307). Brazil expresses its appreciation for the suggestions set out in those documents, which can constitute, in many aspects, important inputs for the work to be carried out by the Secretariat.

6. The general position of the Government of Brazil on this question was expressed in the statement made in the Security Council by the delegation of Brazil on the occasion of the adoption of resolution 808 (1993) (see S/PV.3175, pp. 4-7). The following additional comments refer to specific aspects related to the implementation of that resolution. The Government of Brazil deems it important that these points be duly taken into account in the deliberations relating to the implementation of resolution 808 (1993).

7. The international tribunal referred to in paragraph 1 of resolution 808 (1993) should be an ad hoc independent non-political body. It should be impartial and effective in its work. All stages and aspects of its work must be accomplished in strict observance of the due process of law.

8. The international tribunal should be based on a solid legal foundation that ensures, in a transparent and unobjectionable manner, the legitimacy of its decisions. Legitimacy is required, first and foremost, as an essential element inherent in the idea of justice, but also as an important factor for the effectiveness of the work of the tribunal.

9. The question of the method by which the tribunal is to be established calls for particular attention.

10. It should be established in such a way as to allow it to have jurisdiction over all cases of serious violations of international humanitarian law committed in the territory of the former Yugoslavia by any of the parties to the conflict during an agreed period of time.

11. The international system is based on the existence of a plurality of equally sovereign States. In such a system, which lies at the very foundation of the United Nations, the assertion and the exercise of criminal jurisdiction are essential attributes of national statehood. As a result, criminal jurisdiction cannot be presumed to exist, virtually or in actuality, at the international level.

12. Except under very special circumstances, such as those which prevailed at the end of the Second World War and which made possible the establishment of the Nuremberg and Tokyo International Military Tribunals, criminal jurisdiction can only exist, and be exercised, at the international level if and when it is conferred upon an international body by the State or States concerned.

13. In the light of the above, the most appropriate and effective method for establishing the international tribunal referred to in resolution 808 (1993) would appear to be along the lines suggested in the proposal for an international war crimes tribunal for the former Yugoslavia prepared by the CSCE rapporteurs (S/25307). That method would include the conclusion of a convention setting up an ad hoc international jurisdiction and containing the terms of reference for its exercise, including the text of the statute of the international tribunal.

14. Reference should also be made in this regard to the report of the committee of jurists presented by France, in which, although preference is expressed by the authors for the establishment of an ad hoc tribunal by a resolution of the

Security Council adopted under Chapter VII of the Charter of the United Nations, possible alternative solutions are also discussed (S/25266).

15. The role of the Security Council regarding the establishment and functioning of the tribunal should remain within the limits of the very considerable powers expressly entrusted to it by the Members of the United Nations in accordance with the Charter. The Government of Brazil is not convinced that the competence to establish and/or exercise a criminal jurisdiction is among the constitutional powers of the Security Council.

16. If the tribunal were to be established as a subsidiary organ of the Security Council or as an organ otherwise subordinated to the Council, its independence and impartiality could be questioned.

17. There is a need for a clear and unambiguous definition of the law to be applied by the tribunal, not least as regards the characterization of the crimes to be punished. The relevant international instruments in force in the territory of the former Socialist Federal Republic of Yugoslavia provide an important basis in this regard.

18. The work of the tribunal must be carried out with full respect for the human rights and fundamental freedoms of the defendants. International legal instruments in the field of human rights, especially the International Covenant on Civil and Political Rights, and generally accepted principles of criminal law must be fully respected.

19. This consideration is valid for all aspects of the work of the tribunal, including the assessment of penalties, one of the most sensitive questions related to the establishment of an ad hoc international criminal jurisdiction. In particular, it is essential that no form of cruel, inhuman or degrading punishment be included among the penalties to be imposed by the tribunal.

20. If the members of the Security Council do decide to create the tribunal by a resolution of the Council, consideration should be given to the adoption of measures that would ensure the participation and involvement in this process, through the General Assembly, of the whole membership of the United Nations. In particular, it should be provided that the members of the tribunal be elected by the General Assembly and the Security Council, in a procedure analogous to that applicable to the election of the members of the International Court of Justice, so as to ensure that the body as a whole is based on equitable geographical representation and adequately represents the principal legal systems of the world.

21. Consideration could also be given to other suggestions for involving the General Assembly in the process of establishing the tribunal, such as that contained in paragraph 44 of the document submitted by France (S/25266).

22. It is the hope of the Government of Brazil that an effective international tribunal will be established, on a solid legal basis, to prosecute and try the persons responsible for the heinous war crimes and crimes against humanity committed in the territory of the former Socialist Federal Republic of

Yugoslavia. Brazil stands ready to participate in deliberations to that end, on the basis of the report to be submitted to the Security Council by the Secretary-General.